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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-421

FRED IMBERT, INC.,

Petitioner,

—v.—

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Report of Opinion Below

The opinion below is reported *sub nom. Santiago Martinez* v. *Compagnie Generale Transatlantique* at 517 F. 2d 371, reh. den. —— F. 2d ——.

Jurisdiction

The Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Statute Involved

The statute involved is the first sentence of Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, as amended Oct. 27, 1972, 33 U.S.C. 905(b), which provides that:

> "In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void."

Questions Presented

1. In light of the opinion below and the quoted statutory provision, should *certiorari* be granted to resolve the conflict between courts of appeals as to whether a longshoreman's contributory negligence is *per se* a breach of the stevedore's warranty of workmanlike service, or is merely evidence of such a breach?

2. Does the necessity for a new trial to cure the obscurity of the general verdict by obtaining jury findings of whether plaintiff longshoreman was contributorily negligent and, if so, whether the shipowner is nevertheless precluded from recovering indemnity, deprive petitioner of any Seventh Amendment right to jury trial?

Statement

Plaintiff longshoreman sued respondent shipowner for injury aboard ship in San Juan, P.R. while employed by petitioner stevedore, against whom respondent made third-party claim for indemnity under the doctrine of *Ryan Stevedoring Co.* v. *Pan-Atlantic Corp.*, 350 U.S. 124 (1956).

The District Court charged, specifically without exception by petitioner (A171), that "if you find that the plaintiff was loading one pallet and was struck by another pallet that was being raised, then he would be guilty of contributory negligence" (A171), but "if you find that the plaintiff was holding the bridle of a pallet on which he had been working and which was being raised, and that that was the pallet that struck him and caused his injury, then he was doing his duty and he would not be guilty of contributory negligence" (A171).

There were general verdicts, on which judgment was entered (A174), in favor of plaintiff against respondent and in favor of petitioner denying respondent indemnity (A173). The Court of Appeals affirmed judgment for plaintiff; vacated judgment for petitioner; and remanded respondent's indemnity claim for a new trial (pet. 28).

In its opinion below, the Court of Appeals noted that the District Court's charge that any contributory negligence by plaintiff would be "a factor to be considered by you in determining whether the stevedore has breached its warranty to the shipowner" is consistent with Third and Fifth Circuit decisions, whereas petitioner's requested charge that if there were any such contributory negligence "then

the shipowner would be entitled to recover indemnity" is in accord with Second, Fourth, Ninth, and perhaps Sixth Circuit decisions (pet. 23-24; 517 F. 2d, p. 375). Quoting its recent holding in *Carrillo* v. *Sameit Westbulk*, 514 F. 2d 1214, 1217 (1 Cir. 1975), that "a stevedore's warranty of workmanlike performance encompasses a promise to provide longshoremen free of negligence", the Court below continued:

> "In light of that well-settled rule it is difficult to argue that a stevedore has not breached its warranty when it turns out that one of its employees was negligent within the scope of his employment. We believe the correct rule is that the plaintiff longshoreman's negligence must be imputed to his employer as a basis for indemnity. Of course, this does not mean that a finding of contributory negligence automatically establishes the shipowner's right to indemnity. The fact finder may still find that there was conduct by the shipowner sufficient to preclude indemnity. * * * On the evidence and the charge in this case, coupled with the general verdict, it is entirely possible that the jury found the longshoreman contributorily negligent. Accordingly we are compelled to reverse the judgment for the stevedore and remand for a new trial." (pet. 24-25; 517 F. 2d, pp. 375-376)

Observing that "[a]nother portion of the charge adequately covered the discrete issue of whether shipowner was precluded from recovering indemnity by conduct on its part, * * * so that issue is not involved here" (pet. 23; 517 F. 2d, p. 375), the Court below consonantly ruled that:

> "It is no answer that the jury may have found that the shipowner's conduct * * * was conduct precluding indemnity. If we knew that was their finding, we could avoid a new trial, but we cannot speculate that the error in the charge did not prejudice the shipowner." (pet. 25; 517 F. 2d, p. 376)

Argument

1. *Resolution of conflicting court of appeals' decisions is not here or now "certworthy".*

The conflict as to whether the longshoreman's contributory negligence constitutes or is merely evidence of breach of the stevedore's warranty is at least ten years old, and although circuit judges and *certiorari* petitioners have repeatedly asked that the conflict be resolved, the Court has declined to do so. *E.g., McLaughlin* v. *Trelleborgs Angfartygs A/B,* 408 F. 2d 1334 (2 Cir. 1969), cert. den. sub nom. *Golten Marine Co.* v. *Trelleborgs Angfartygs A/B,* 395 U.S. 946 (1969); *Julian* v. *Mitsui O.S.K. Lines, Ltd.,* 479 F. 2d 432 (5 Cir. 1973), cert. den. sub nom. *Mitsui O.S.K. Lines, Ltd.* v. *Strachan Shipping Co.,* 414 U.S. 1093 (1973). It would be anomalous if the Court decided to settle the conflict now that Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, as amended Oct. 27, 1972, 33 U.S.C. 905(b), *supra,* p. 2, has made the question moot for all but a few litigants. *Cf., Julian* v. *Mitsui O.S.K. Lines, Ltd., supra,* 479 F. 2d, p. 434.

The argument that the consequences of petitioner's breach were off-set by reduction for plaintiff's contributory negligence (pet. 6) is not new, *cf., McLaughlin* v. *Trelleborgs Angfartygs A/B, supra,* 408 F. 2d, p. 1335, and has con-

sistently been rejected because it ignores the fundamental distinction between joint tortfeasor contribution and contractual indemnity elucidated in *Ryan Stevedoring Co.* v. *Pan-Atlantic Corp., supra,* 350 U.S., pp. 131-132, 133.

The rule which the Court below decided to follow is the most equitable and defensible. Negligence by the stevedore "has been held without exception to constitute a breach of its warranty", *Drago* v. *A/S Inger,* 194 F. Supp. 398, 403 (E.D.N.Y. 1961), aff'd 305 F. 2d 139 (2 Cir. 1962), cert. den. sub nom. *Daniels & Kennedy, Inc.* v. *A/S Inger,* 371 U.S. 925 (1962); *Massa* v. *C.A. Venezuelan Navigacion,* 332 F. 2d 779, 782 (2 Cir. 1964), cert. den. 379 U.S. 914 (1964). Except in rare instances where the stevedore provides latently defective gear, the only way the stevedore can breach its warranty is by being negligent and, because the stevedore performs by its employee longshoremen, the only way the stevedore can be negligent is by the conduct of such employees. It should make no difference whether the negligent employee is the plaintiff or another longshoreman. *Cf., Mortensen* v. *A/S Glittre,* 348 F. 2d 383, 385 (2 Cir. 1965). Thus, as the Court below aptly quoted, "a stevedore's warranty of workmanlike performance encompasses a promise to provide longshoremen free of negligence" (pet. 24; 517 F. 2d, pp. 375-376). That "well-settled rule" dovetails with the Court's "brought into play", *Crumady* v. *The J.H. Fisser,* 358 U.S. 423, 429 (1959), and "party best situated to adopt preventive measures and thereby to reduce the likelihood of injury", *Italia Societa* v. *Oregon Stevedoring Co.,* 376 U.S. 315, 324 (1964), decisions. But for the contributorily negligent longshoreman, whose conduct the shipowner is least able to control, any shipboard danger would remain harmless.

"Of course, this does not mean that a finding of contributory negligence automatically establishes the shipowner's right to indemnity. The fact finder may still find that there was conduct by the shipowner sufficient to preclude indemnity" (pet. 24-25; 517 F. 2d, p. 376), a finding obscured by the general verdict, which the Court below remanded for a new trial.

2. *Petitioner was not deprived of any Seventh Amendment right to jury trial.*

Petitioner's Point II misconceives. There is no question of evidentiary sufficiency, as petitioner conceded by concurring with the alternative contributory negligence charge, *supra,* p. 3. The question is whether the erroneous indemnity charge prejudiced respondent. The Court below did not "search the record" to affirmatively answer that question; it properly declined to "speculate that the error in the charge did not prejudice the shipowner" (pet. 25; 517 F. 2d, p. 376).

> "* * * in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless." *Fillippon* v. *Albion Vein Slate Co.,* 250 U.S. 76, 82 (1919)

It is axiomatic that a party cannot be denied a Constitutional right to jury trial by vacating judgment entered on a verdict premised on an erroneous charge, and that the right would be deprived if such judgment were affirmed.

Petitioner inconsistently conjectures that the jury found no contributory negligence or found conduct precluding in-

demnity. But, as the Court below discerned, because of the general verdict's abstruseness, no one can tell whether or not the jury so found (pet. 25; 517 F. 2d, p. 376). The difficulty, resulting from the defective charge, is that if the jury found contributory negligence, it could not find *per se* breach of petitioner's warranty, leading to the question of whether any conduct by respondent precludes indemnity.

Conclusion

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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November 26, 1975